

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FACEBOOK, INC., ) CV-08-3468-JF  
)  
PLAINTIFF, ) SAN JOSE, CALIFORNIA  
)  
VS. )  
) MAY 1, 2009  
STUDIVZ, LTD, ET AL, )  
)  
DEFENDANT. ) PAGES 1-32  
)  
\_\_\_\_\_)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JEREMY FOGEL  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: ORRICK HERRINGTON & SUTCLIFFE  
BY: THOMAS J. GRAY  
4 PARK PLAZA, STE 1600  
IRVINE, CA 92614

FOR THE DEFENDANT: GREENBERG GLUSKER  
BY: STEPHEN SMITH  
WILLIAM WALKER  
1900 AVENUE OF THE STARS  
STE 2100  
LOS ANGELES, CA 90067

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR,  
CERTIFICATE NUMBER 13185

FOR THE PLAINTIFF: ORRICK HERRINGTON & SUTCLIFFE  
BY: JULIO AVALOS  
1000 MARSH ROAD  
MENLO PARK, CA 94025

1 SAN JOSE, CALIFORNIA

MAY 1, 2009

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: THE NEXT AND FINAL MATTER IS  
6 FACEBOOK VERSUS STUDIVZ.

7 MR. SMITH: GOOD MORNING, YOUR HONOR.

8 STEVEN SMITH AND WILLIAM WALKER ON BEHALF  
9 OF DEFENDANTS STUDIVZ, HOLTZBRINCK NETWORKS AND  
10 HOLTZBRINCK VENTURES.

11 MR. GRAY: GOOD MORNING, YOUR HONOR.

12 TOM GRAY AND JULIO AVALOS ON BEHALF OF  
13 FACEBOOK.

14 THE COURT: GOOD MORNING.

15 WELL, LET ME ASK STUDIVZ A QUESTION.  
16 THERE ARE SEVERAL MOTIONS THAT ARE BUMPING AROUND.  
17 THERE ARE JURISDICTIONAL MOTIONS THAT ARE NOT  
18 BEFORE THE COURT THIS MORNING BECAUSE OF SOME  
19 ONGOING DISCOVERY DISPUTES.

20 I THINK IT'S KIND OF A DISCRETIONARY  
21 DETERMINATION FOR THE COURT TO MAKE, WHETHER IT  
22 WANTS MAKE UP THE FOREIGN NON CONVENIENS MOTION  
23 BEFORE THE JURISDICTIONAL ISSUES ARE FULLY  
24 PRESENTED.

25 I'M PREPARED TO DO IT, AND I'M PREPARED

1 NOT TO DO IT. I'D LIKE TO GET FEEDBACK FROM BOTH  
2 PARTIES. I KNOW FACEBOOK HAS BEEN ANXIOUS TO GET  
3 THESE MATTERS HEARD, BUT WHAT'S YOUR VIEW?

4 MR. SMITH: STUDIVZ AND HOLTZBRINCK'S  
5 VIEW IS THEY SHOULD BE HEARD NOW, SEPARATE AND  
6 APART FROM JURISDICTION, FOR REASONS WE BRIEFED  
7 BEFORE.

8 BRIEFLY, THE SINOCHEM CASE, WHICH IS THE  
9 U.S. SUPREME COURT CASE, TALKS ABOUT CIRCUMSTANCES  
10 THAT ARE PRESENT HERE THAT FORM CAN BE CONSIDERED  
11 FIRST.

12 THE COURT: I KNOW I HAVE SINOCHEM. IF  
13 IT SAYS NOTHING ELSE, IT SAYS I HAVE DISCRETION TO  
14 DO IT. I'M TRYING TO DETERMINE WHAT YOUR  
15 PREFERENCE IS.

16 MR. SMITH: MY PREFERENCE TO HAVE THE  
17 FORUM NON CONVENIENS HEARD FIRST.

18 WE DO HAVE AN OUTSTANDING DISCOVERY  
19 DISPUTE THAT IS A -- ALTHOUGH WE RESPECTFULLY  
20 DISAGREED WITH FACEBOOK'S ISSUE ON IT, IT'S A  
21 COMPLICATED ISSUE. SO THE FORUM ISSUE SHOULD BE  
22 HEARD FIRST BECAUSE IT'S CLEAN.

23 THE COURT: AND FACEBOOK, I TAKE IT,  
24 DISAGREES WITH THAT?

25 MR. GRAY: YES, YOUR HONOR, WE DO.

1           YOUR HONOR, I THINK YOU'VE HIT THE NAIL  
2           ON THE HEAD WITH RESPECT TO WHAT THIS MOTION TODAY  
3           IS ALL ABOUT IN TERMS OF PREVENTING AND AVOIDING  
4           DISCOVERY IN THIS ACTION.

5           THE COURT:   WHY ISN'T THAT A GOOD THING?

6           MR. GRAY:   WELL, IT'S NOT A GOOD THING  
7           BECAUSE PLAINTIFF HAS RIGHTFULLY BROUGHT U.S. AND  
8           CALIFORNIA-BASED CLAIMS HERE BEFORE THIS COURT FOR  
9           INJURY IT SUFFERED HERE.

10          BUT TO ANSWER YOUR QUESTION REGARDING  
11          SINOCHEM, I'M NOT SURE THAT SINOCHEM DOES GRANT YOU  
12          FULL DISCRETION TO HEAR THE FORUM NON CONVENIENS  
13          PORTION OF THEIR MOTION AT THIS TIME.

14          IF YOU LOOK AT SINOCHEM, PAGE 433, 549 US  
15          433, THE COURT SAYS THERE SHOULD BE NO ASSUMPTION  
16          OF LAW DECLARING POWER UNLESS THE COURT FINDS THAT  
17          THE FORUM NON CONVENIENS MOTION IS SO CLEAR, AS IT  
18          DID IN THE SINOCHEM CASE, WHERE IT WAS ALL FOREIGN  
19          PARTIES DISPUTING EVENTS THAT OCCURRED IN A FOREIGN  
20          LOCALE.

21          THE COURT:   YOU ARE DISTINGUISHING  
22          SINOCHEM ON ITS FACTS.   THE COURT HAS DISCRETION,  
23          AND LIKE MOST DISCRETION THERE ARE LIMITS ON IT,  
24          BUT THE COURT CAN STILL LOOK AT THE FORUM FACTORS  
25          AND DECIDE IF THEY ARE CLEAR.

1 I AGREE THEY HAVE TO BE PRETTY STRONG AND  
2 THE JURISDICTIONAL ISSUES HAVE TO BE STICKY, WHICH  
3 THEY ARE HERE, AND UNDER THOSE CIRCUMSTANCES THE  
4 COURT HAS DISCRETION.

5 YOU ARE SAYING THAT I THINK, ULTIMATELY,  
6 THAT THE FORUM FACTORS ARE NOT NEARLY AS CLEAR IN  
7 SINOCHEM.

8 MR. GRAY: THAT'S CORRECT, YOUR HONOR.

9 I THINK, IN THIS INSTANCE, THERE'S A LOT  
10 OF DISPUTE OF FACTUAL ISSUES.

11 THE COURT: I STARTED WITH COUNSEL, BUT  
12 I'M GOING TO FOCUS MY QUESTIONS ON YOU AT THIS  
13 POINT.

14 YOU KNOW, GERMANY ISN'T EXACTLY -- WHO DO  
15 I INSULT HERE -- GERMANY ISN'T SOMALIA, IT'S NOT A  
16 FAILED STATE WITH NO LEGAL SYSTEM AND NO RECOURSE.  
17 IT'S A VERY SOPHISTICATED LEGAL SYSTEM. AND, IN  
18 FACT, THESE VERY PARTIES ARE LITIGATING CLOSELY  
19 RELATED CLAIMS IN GERMANY.

20 SO GIVEN THAT, GIVEN THAT THERE ARE  
21 STICKY JURISDICTIONAL QUESTIONS, GIVEN THERE'S NO  
22 REASON TO THINK THAT A GERMAN COURT WOULDN'T OR  
23 COULDN'T CONSIDER THE UNIQUE CALIFORNIA CLAIMS  
24 FACEBOOK HAS, WHY SHOULD THERE BE LITIGATION GOING  
25 ON IN TWO DIFFERENT FORUMS OVER CLOSELY RELATED

1 ISSUES WHEN A LOT OF THE CRITICAL DEFENSE WITNESSES  
2 ARE IN GERMANY, A LOT OF THE MISCONDUCT THAT'S  
3 ALLEGED TOOK PLACE IN GERMANY?

4 IT MAY NOT BE SINOCHEM, BUT IT STRIKES  
5 ME, AT LEAST SUPERFICIALLY, AS BEING PRETTY CLOSE  
6 THAT THERE ARE A LOT OF CONVENIENCE FACTORS AND  
7 JUDICIAL ECONOMY FACTORS THAT ARE IN FAVOR OF  
8 GERMANY.

9 I NEED TO UNDERSTAND WHAT CAN'T FACEBOOK  
10 GET IN GERMANY THAT IT COULD GET IN CALIFORNIA?  
11 WHAT'S THE HARM?

12 MR. GRAY: FIRST OFF, TAKING A STEP BACK,  
13 OBVIOUSLY, THE DEFENDANTS RELY HEAVILY ON THE FACT  
14 THAT THERE IS ANOTHER CASE IN GERMANY, AS WE  
15 POINTED OUT IN OUR BRIEF, THE ADELSON CASE, THE  
16 DOLE CASE, THE HAYES CASE, ALL OF THESE CASES SAY  
17 THAT DUPLICATIVE LITIGATION ISN'T A FACTOR UNDER  
18 FORUM NON CONVENIENS ANALYSIS.

19 THE COURT: WELL, DOLE, IT JUST SO  
20 HAPPENS -- THERE'S SERENDIPITY, BUT IF YOU ARE A  
21 JUDGE LONG ENOUGH THESE THINGS HAPPEN.

22 I WAS ON THE PANEL IN DOLE, AND THE  
23 ANALYSIS IN THAT CASE IS WHERE IS THE BRUNT OF THE  
24 HARM? WHERE IS THE CENTER OF GRAVITY OF THE  
25 DISPUTE? AND, YOU KNOW, I THINK THERE'S A DESCENT

1 ARGUMENT THAT THE CENTER OF GRAVITY IN THIS CASE IS  
2 IN GERMANY.

3 MR. GRAY: THE CENTER OF GRAVITY OF THE  
4 HARM TO FACEBOOK, AS A LOCAL ENTITY WITH ITS  
5 PRINCIPAL PLACE OF BUSINESS RIGHT UP THE STREET IN  
6 PALO ALTO, CALIFORNIA.

7 YES, THEY'VE GOT USERS IN GERMANY THAT  
8 THEY UNFAIRLY AND IMPROPERLY GAINED BECAUSE OF  
9 THEIR ACTIONS IN GERMANY, BUT THE BRUNT OF ECONOMIC  
10 INJURIES ARE SUFFERED HERE.

11 AND WE ALSO HAVE TO LOOK, WHICH THE  
12 DEFENDANTS DON'T LOOK AT MUCH AT ALL, THERE ARE  
13 DEFENDANT USERS IN CALIFORNIA AND THROUGHOUT THE  
14 UNITED STATES.

15 SO THERE IS HARM TO FACEBOOK'S  
16 INTELLECTUAL PROPERTY RIGHT HERE IN CALIFORNIA WITH  
17 OVER 11,000 USERS, AND PROBABLY TENS OF THOUSANDS,  
18 IF NOT HUNDREDS OF THOUSANDS OF USERS, THROUGHOUT  
19 THE UNITED STATES.

20 AGAIN, AT THIS EARLY STAGE OF THIS CASE  
21 WITH NO DISCOVERY PROVIDED FOR MANY PARTS OF THE  
22 DESIGN DEVELOPMENT AND THE ACTIONS TAKEN BY  
23 DEFENDANTS IN GERMANY, FACEBOOK IS AT A  
24 DISADVANTAGE OF COMING FORTH --

25 THE COURT: TO GET BACK TO MY EARLIER



1 QUESTION, WHAT CAN'T YOU GET IN GERMANY THAT YOU  
2 CAN GET IN CALIFORNIA? I REALIZE THAT'S NOT THE  
3 ONLY QUESTION THE COURT HAS TO LOOK AT, BUT JUST IN  
4 TERMS OF CONVENIENCE AND ECONOMY.

5 IF YOU HAVE YOUR WAY, WE ARE GOING TO  
6 HAVE PARALLEL LITIGATION GOING ON IN TWO DIFFERENT  
7 CONTINENTS ABOUT SOME OF THE SAME DISPUTED FACTS  
8 AND INVOLVING A LOT OF THE SAME PEOPLE.

9 WHY DOES THAT MAKE SENSE? WHY DO THE  
10 EQUITIES FAVOR THAT RATHER THAN HAVING ONE COURT IN  
11 A CIVILIZED INDUSTRIAL COUNTRY MAKING A  
12 DETERMINATION OF THE PARTIES' RIGHTS.

13 MR. GRAY: BECAUSE THE CLAIMS ARE  
14 DIFFERENT HERE, YOUR HONOR. THESE ARE LARGELY U.S.  
15 BASED FEDERAL CLAIMS.

16 AGAIN, IT'S DEFENDANT'S BURDEN TO COME  
17 FORWARD TO SHOW THAT THESE CLAIMS WOULD BE  
18 DUPLICATIVE, THAT ALL THE WITNESSES AND ALL THE  
19 EVIDENCE WOULD BE DUPLICATIVE OF WHAT'S GOING ON IN  
20 GERMANY.

21 AND THEY CAN'T DO THAT BECAUSE THE TRADE  
22 DRESS CLAIMS HAS DIFFERENT ELEMENTS AND DIFFERENT  
23 ISSUES AND WOULD REQUIRE DIFFERENT TESTIMONY FROM  
24 DIFFERENT WITNESSES THAT WOULD BE GOING FORWARD ON  
25 THE UNFAIR COMPETITION OF COPYRIGHT CLAIMS.

1 THE COURT: THEY ARE CLOSELY RELATED,  
2 THOUGH, AREN'T THEY? I MEAN, IT'S A FORM OF UNFAIR  
3 COMPETITION -- IT'S NOT COMMON LAW AND UNFAIR  
4 COMPETITION, BUT IT'S MISUSING A PARTY'S PRESENCE  
5 IN THE MARKETPLACE IN A WAY THAT'S UNFAIR.

6 THERE'S A COMMON THREAD IN ALL OF THESE  
7 THINGS.

8 MR. GRAY: THERE'S CERTAINLY A COMMON  
9 THREAD IN THE FACT THAT, YOU KNOW, IT'S A TRADEMARK  
10 RELATED ISSUE AND UNFAIR COMPETITION IS TRADEMARK  
11 RELATED. BUT THE TRADE DRESS CLAIM HERE HAS AN  
12 ELEMENT THAT THE DESIGN HAS TO BE A NON-FUNCTIONAL  
13 DESIGN.

14 THAT'S NOT AN ELEMENT AT ISSUE IN THE  
15 GERMAN CASE. THAT WILL REQUIRE DIFFERENT  
16 TESTIMONY, DIFFERENT EXPERTS, DIFFERENT DOCUMENTS  
17 THAT WILL BE HERE, AND FACEBOOK WILL BE  
18 INCONVENIENCED FOR HAVING TO BRING ALL THOSE PEOPLE  
19 TO GERMANY.

20 SO THAT IS ONE ASPECT. BUT THERE'S ALSO  
21 THE COMPUTER TRESPASS CLAIMS. THOSE ARE NOT AT  
22 ISSUE IN THE GERMAN CASE. THOSE ARE VERY DISTINCT  
23 U.S. BASED CLAIMS, CALIFORNIA-BASED CLAIMS, THAT  
24 AGAIN, WILL HAVE DIFFERENT WITNESSES REGARDING THE  
25 ACTIONS ON THE PALO ALTO, U.S. BASED SERVERS THAT

1 FACEBOOK OWNS.

2 ONCE WE CAN GET DISCOVERY TO SEE HOW MANY  
3 PEOPLE -- THE EXTENT OF THE INTERACTION ON  
4 FACEBOOK'S CALIFORNIA SERVERS, WE CAN GO LOOK AND  
5 SEE EXACTLY WHAT THEY'VE DONE.

6 BUT THOSE ARE VERY, VERY BROAD CLAIMS  
7 THAT PREDICT THE EXACT TYPE OF ACTION WE HAVE HERE,  
8 UNAUTHORIZED USE OR ACCESS TO A COMPUTER SYSTEM,  
9 AND THAT UNAUTHORIZED USE WILL REQUIRE, AGAIN,  
10 DIFFERENT WITNESSES AND DIFFERENT TESTIMONY,  
11 DIFFERENT DOCUMENTS, DIFFERENT EVIDENCE THAT  
12 CURRENTLY RESIDES RIGHT HERE IN CALIFORNIA THAT  
13 WOULD NOT BE NEEDED IN THE CURRENT GERMAN --

14 THE COURT: OKAY. HOW FAR OFF ARE WE IN  
15 TERMS OF GETTING THE JURISDICTIONAL MOTIONS TEED  
16 UP? I KNOW YOU'RE IN THE MIDST OF OBJECTIONS AND  
17 MOTIONS AND SO FORTH.

18 MR. GRAY: I THINK WE ARE BEYOND THAT.  
19 IT'S NO SURPRISE THAT DEFENDANTS SWITCHED GEARS  
20 AFTER JUDGE LLYOD INDICATED THAT HE WAS READY TO  
21 REQUIRE THEM TO PRODUCE DISCOVERY REGARDING THE  
22 DESIGN AND DEVELOPMENT DOCUMENTS RELATED TO THEIR  
23 ACTIONS HERE IN THE U.S. ON THE U.S. SERVERS AND  
24 HOW THEY DESIGN THEIR PRODUCT.

25 AS SOON AS JUDGE LLYOD INDICATED THAT

1        THAT WAS GOING TO HAPPEN, THEY PULLED BACK ON THEIR  
2        PERSONAL JURISDICTION MOTION AND SAID, LET'S GO  
3        FORWARD WITH THE FORUM --

4                THE COURT:    THAT'S A STRATEGIC  
5        OBSERVATION.

6                I'M SAYING -- MY QUESTION IS EXTREMELY  
7        SIMPLE.    HOW LONG WOULD IT TAKE -- IF I DENIED THE  
8        FORUM NON CONVENIENS MOTION, HOW LONG WOULD IT TAKE  
9        FOR THE JURISDICTION, PERSONAL SUBJECT MATTER  
10       JURISDICTION -- I'M SORRY, PERSONAL JURISDICTION.  
11       HOW LONG WOULD IT TAKE FOR THAT MOTION TO BE READY  
12       TO BE HEARD?

13               MR. GRAY:    OF COURSE, IT DEPENDS ON THE  
14       DISCOVERY.    IF WE CAN GET DISCOVERY IN 30 DAYS, THE  
15       MOTION CAN BE HEARD 35 DAYS AFTER THAT, YOUR HONOR.

16               THE COURT:    SO YOU DON'T KNOW, IN OTHER  
17       WORDS.

18               MR. GRAY:    WE DON'T KNOW BECAUSE THEY'VE  
19       BEEN DRAGGING THEIR FEET.

20               THE COURT:    IT WILL BE A COUPLE OF  
21       MONTHS, AT LEAST.

22               MR. GRAY:    CERTAINLY.    A COUPLE OF MONTHS  
23       TO GET THE DISCOVERY REVIEW, THE DISCOVERY, AND  
24       WRITE UP THE SUPPLEMENTAL BRIEFS.

25               BUT IT SHOULD NOT BE SIX MONTHS OR A

1 YEAR, IT SHOULD BE RELATIVELY QUICK IF DEFENDANTS  
2 COMPLY WITH THE DISCOVERY ISSUES.

3 THE COURT: AND APART FROM THE LEGAL  
4 ANALYSIS THAT THERE ARE FREESTANDING U.S. CLAIMS,  
5 THE PRACTICAL IMPACT OF THE CASE IN GERMANY IS THAT  
6 FACEBOOK'S WITNESSES ON THE TRADE DRESS CLAIM AND  
7 ON THE COMPUTER CLAIM ARE NOT WITNESSES WHO  
8 OTHERWISE WOULD BE CALLED IN THE GERMAN ACTION AND  
9 THEY WOULD HAVE TO GO TO GERMANY TO PARTICIPATE.

10 MR. GRAY: THAT'S THE INCONVENIENCE ON  
11 THE PRIVATE FACTOR. BUT, OF COURSE, WE THINK THIS  
12 COURT HAS SUBSTANTIAL PUBLIC INTEREST IN  
13 ADJUDICATING THESE CLAIMS FROM A U.S. PLAINTIFF, OF  
14 A LOCAL PLAINTIFF, THAT HAS SUFFERED FINANCIAL  
15 INJURY HERE LOCALLY REGARDING U.S. BASED CLAIMS,  
16 NOVEL AND SOMEWHAT UNIQUE U.S. BASED CLAIMS, AS WE  
17 POINT OUT IN OUR BRIEF.

18 THE COURT: OVER A PARTY THAT IT MAY OR  
19 MAY NOT HAVE JURISDICTION OVER. I MEAN, I DON'T  
20 KNOW THAT. I MEAN, I SUPPOSE I COULD SPECULATE AS  
21 TO HOW THAT'S GOING TO TURN OUT. THERE'S,  
22 OBVIOUSLY, A MESSY FIGHT ABOUT JURISDICTION. IT'S  
23 NOT A SELF-EVIDENT TYPE OF THING.

24 MR. GRAY: WELL, IT'S A MESSY FIGHT NOW.  
25 WE THINK THERE'S CLEARLY JURISDICTION BASED ON THE

1           CONTEXT.

2                   THE COURT:    THAT'S WHY YOU SUED THEM  
3           HERE.

4                   MR. GRAY:    EXACTLY.    THAT'S WHY WE SUED  
5           THEM HERE.

6                   AND WE'RE ALSO NOT DEALING WITH THE FORUM  
7           SELECTION CLAUSE AND TERMS OF USE.   AND DEFENDANTS  
8           RAISE SOME RED HERRING ISSUES WITH RESPECT TO  
9           WHETHER THERE'S AN ARBITRATION PROVISION AFTER  
10          DECEMBER 2006, OR WHETHER BOSTON SHOULD HAVE BEEN  
11          THE FORUM BEFORE JUNE OF 2005.

12                   BUT AS WE SUBMITTED, DURING THE CRUCIAL  
13          RELEVANT TIME PERIOD HERE JUNE 2005 THROUGH 2006,  
14          THERE WAS A CLICK THROUGH LICENSE --

15                   THE COURT:    I DON'T KNOW THAT YOU WANT TO  
16          GO THERE, THOUGH.    THAT'S AN INTERESTING FORUM  
17          SELECTION CLAUSE BECAUSE THEY CONSENT TO  
18          JURISDICTION BUT IT CERTAINLY IS NOT AN EXCLUSIVE  
19          JURISDICTION.

20                   WHEN I SAY "THEY," I MEAN WHOEVER,  
21          ASSUMING THAT A PARTY IS BOUND BY THAT, THEY  
22          CONSENT TO JURISDICTION, BUT IT'S NOT AN  
23          EXCLUSIVE --

24                   MR. GRAY:    I WOULD DISAGREE, YOUR HONOR.  
25          I WOULD SAY THAT THAT ARBITRATION PROVISION SAYS

1        THAT ACTIONS WILL BE CONDUCTED HERE IN  
2        SANTA CLARA COUNTY RELATED TO THE BREACH OF THE  
3        AGREEMENT AS WELL AS --

4                THE COURT:    DOES IT SAY -- AND REFRESH ME  
5        IF I'M WRONG ABOUT THIS.    I DON'T BELIEVE IT SAYS  
6        THAT THE COURT'S, FEDERAL AND STATE COURTS OR  
7        WHATEVER OF SANTA CLARA COUNTY, SHALL HAVE  
8        EXCLUSIVE AND SOLE EXCLUSIVE JURISDICTION.    I DON'T  
9        THINK THERE'S ANY LANGUAGE LIKE THAT.

10               MR. GRAY:    IT CERTAINLY DOES MENTION THE  
11        COURTS OF THIS JURISDICTION.

12               THE COURT:    AND THERE'S NO QUESTION ABOUT  
13        THAT, BUT I DON'T RECALL SEEING THE WORD  
14        "EXCLUSIVE" IN THERE.

15               IF IT'S IN THERE, I MISSED IT.    AND THE  
16        NINTH CIRCUIT HAS HAD A LOT OF CASES ON THIS AND THEY  
17        FOCUS ON THE PRESENCE OR ABSENCE OF THAT.

18               OKAY.    WELL, I THINK THIS IS BOTH A LEGAL  
19        AND A PRACTICAL INQUIRY.    I APPRECIATE YOUR  
20        COMMENTS.

21               LET ME GET A RESPONSE FROM THE  
22        DEFENDANTS.

23               MR. SMITH:    THERE WERE A NUMBER OF THINGS  
24        SAID THERE, YOUR HONOR.    I WILL TRY TO BE AS BRIEF  
25        AS POSSIBLE.

1                   YOUR FIRST QUESTION FOCUSED, THOUGH, ON  
2                   WHAT TYPE OF RELIEF FACEBOOK IS UNABLE TO GET IN  
3                   GERMANY THAT IT CAN GET HERE.

4                   WITH ALL DUE RESPECT, I THINK IF YOU LOOK  
5                   AT THE COMPLAINTS IN GERMANY, AND THERE ARE NOW TWO  
6                   IN THE CLONE ACTION, I THINK AN 82 PAGE FIRST ONE  
7                   AND THEN AN AMENDED ONE THAT WAS FILED MORE  
8                   RECENTLY ABOUT A MONTH OR TWO AGO, EVERY SINGLE  
9                   FACTUAL ALLEGATION AND EVERY TYPE OF RELIEF THAT IS  
10                  BEING SOUGHT IN THIS CASE IS BEING SOUGHT THERE.

11                  YES, THEY ARE CALLED DIFFERENT THINGS IN  
12                  GERMANY.

13                  THE COURT:   THERE'S DIFFERENT THEORIES,  
14                  BUT WHAT THEY ARE LOOKING FOR IS THE SAME.

15                  MR. SMITH:   THAT IS CORRECT.

16                  AND THE LAW IS QUITE CLEAR, I THINK, IN  
17                  THE FORUM.   THERE IS A LOT OF LAW ON THIS ISSUE,  
18                  BUT YOU DON'T HAVE TO HAVE THE SAME LABEL ON THE  
19                  CLAIM; AND IN FACT, IT'S EVEN REALLY BETTER FOR US  
20                  THAT WE DON'T NEED IT HERE.

21                  THE COURT:   WELL, BASICALLY WHAT COUNSEL  
22                  IS SAYING, WHEN IT COMES DOWN TO IT, IS THAT THERE  
23                  ARE SOME SETS OF WITNESSES GIVEN THESE CLAIMS THAT  
24                  AREN'T IN THE GERMAN CASE WHO WOULD BE  
25                  INCONVENIENCED; AND I THINK THAT'S CERTAINLY



1 ENTITLED TO SOME WEIGHT.

2 AND THE OTHER THING HE'S SAYING, WHICH I  
3 THINK IS PROBABLY THE MORE COMPELLING POINT, IS  
4 THIS IS A LOCAL COMPANY WHICH IS ENTITLED TO EXPECT  
5 THE PROTECTIONS OF A LOCAL FORUM.

6 AND, CLEARLY, SOME OF THE RELEVANT FACTS  
7 IN THIS CASE ARISE HERE. IT'S NOT -- NOTHING IS  
8 HAPPENING IN PALO ALTO. AND THEY BELIEVE THEY HAVE  
9 A GOOD ARGUMENT ON PERSONAL JURISDICTION WHICH THE  
10 COURT HASN'T BEEN ABLE TO ADDRESS YET.

11 SO AT LEAST UNTIL THE COURT IS ABLE TO  
12 ADDRESS THAT, WHY SHOULD WE SAY TO A LOCAL PARTY  
13 THAT HAS A RIGHT TO RELY ON ACCESS TO THE LOCAL  
14 COURTS, PARTICULARLY WHERE THERE IS A FORUM  
15 SELECTION CLAUSE AND WHETHER IT'S EXCLUSIVE AND  
16 BINDING IN EVERY CASE -- WHICH IS SOMETHING I  
17 HAVEN'T DETERMINED YET -- WHY SHOULD WE SAY YOU  
18 NEED TO GO TO GERMANY BECAUSE THERE'S A CASE  
19 PENDING OVER THERE THAT INVOLVES SOME OF THE SAME  
20 PARTIES AND CLAIMS?

21 IF WE DON'T HAVE JURISDICTION OVER YOUR  
22 CLIENT THEN IT'S EASY, THEN YOU HAVE TO GO TO  
23 GERMANY. BUT IF THERE IS STILL A DETERMINATION TO  
24 BE MADE AS TO WHETHER YOUR CLIENT IS SUBJECT TO  
25 JURISDICTION, WHY SHOULD THE COURT JUMP THE GUN AND

1 SAY, GO AWAY?

2 MR. SMITH: WELL, LEGALLY, FOR THE EXACT  
3 SAME REASONS IN SINOCHEM. AND WE CAN DISCUSS WHAT  
4 THE FACTS ARE ON POINT WITH THE SINOCHEM VERSUS NOT  
5 WITH THE LAW ON POINT.

6 THAT LAW IS ALSO ON POINT THAT A RESIDENT  
7 PLAINTIFF, ALTHOUGH IT IS A FACTOR THAT IS ENTITLED  
8 TO WEIGHT AND WE NEVER CLAIMED THE CONTRARY, IT IS  
9 NOT A DISPOSITIVE FACTOR IN AND OF ITSELF.

10 AND IN THIS CASE IT'S NOT -- I HATE TO  
11 PICK ON LITTLE OLD LADIES, BUT IT'S NOT A LITTLE  
12 OLD LADY IN CALIFORNIA, WHOSE HUSBAND -- BECAUSE  
13 ONE OF THE CASES INVOLVES THIS -- WHOSE HUSBAND WAS  
14 KILLED BY TERRORISTS IN EGYPT AND HER ASKING US TO  
15 GO TO EGYPT TO SEEK REDRESS.

16 THIS IS A MULTINATIONAL COMPANY BY TWO  
17 HUNDRED MILLION, BY THEIR OWN ESTIMATION --

18 THE COURT: AND A CORPORATE PRESENCE IN  
19 GERMANY.

20 MR. SMITH: WITH A WEB SITE IN GERMANY  
21 OPERATING ALL OVER THE WORLD. THE CONTACT LUMBER  
22 CASE DISCUSSES THAT PARTICULAR ISSUE DIRECTLY.

23 IN ADDITION, THEY, THEMSELVES, ARE  
24 LITIGATING. WE ARE NOT -- WE ARE NOT TRYING TO  
25 FORCE THEM INTO SOME FORUM --

1 THE COURT: THEY'RE THE PLAINTIFF.

2 MR. SMITH: THAT'S CORRECT. THEY ARE THE  
3 PLAINTIFF, YES THE STUTTGART ACTION WHICH WAS A  
4 DECLARATORY RELIEF ACTION STUDIVZ FILED, WAS FILED  
5 FIRST. THERE ARE TWO CASES WE SIGHT BOTH CREATIVE  
6 AND LOCKMAN, WHERE THAT EXACT SAME THING HAPPENED.  
7 THE COURT DID NOT HAVE ANY ISSUE WITH THAT.

8 THE COURT ACTUALLY DID RELY UPON THE FACT  
9 THAT THERE WAS ANOTHER PIECE OF LITIGATION ALREADY  
10 PENDING. SOME CONTRARY, WITH ALL DUE RESPECT TO  
11 MR. GRAY'S STATEMENT, BUT IT'S NOT A FACTOR. IT'S  
12 A FACTOR IN SINOCHEM, IT'S A FACTOR IN CREATIVE,  
13 IT'S A FACTOR IN CONTACT LUMBER, AND IT'S A FACTOR  
14 IN LOCKMAN.

15 IT'S A FACTOR IN ALL KINDS OF CASES. AND  
16 IT'S USUALLY QUITE AN IMPORTANT FACTOR FOR THE  
17 REASON YOUR HONOR ALREADY NOTED, WHICH IS, IT  
18 DOESN'T MAKE SENSE, FROM A JUDICIAL ECONOMY  
19 PERSPECTIVE, TO FIGHT OVER THE SAME FACTS SEEKING  
20 THE SAME RELIEF IN TWO DIFFERENT PLACES.

21 IN ADDITION, SPECIFICALLY AS TO THE  
22 COMPUTER ABUSE ACT, WE'VE NOTED THIS IN OUR BRIEFS  
23 AND IT'S IN THE PLEADINGS IN GERMANY. THEY ARE  
24 SEEKING REDRESS SPECIFICALLY FOR THAT. RIGHT NOW  
25 THERE IS PENDING A REQUEST FOR A NEUTRAL EXPERT

1 SEARCH OF THE ENTIRE PREMISES, INSPECTION OF ALL  
2 THE COMPUTER SYSTEMS, ALL THE SERVERS, ALL OF THE  
3 SOURCE CODE, TO GET INTO WHETHER OR NOT THAT TYPE  
4 OF ACCESS THAT THEY'RE TALKING ABOUT DID, IN FACT,  
5 OCCUR.

6 SO YES, THEY DON'T CALL IT THE COMPUTER  
7 ABUSE ACT, BUT WITHIN THE CASE, AS A FACTUAL AND  
8 LEGAL MATTER UNDER A DIFFERENT LABEL, THE EXACT  
9 SAME THING IS BEING LAID.

10 THE COURT: CAN I ASK YOU THIS -- THIS  
11 MAY COME OUT OF LEFT FIELD -- BUT I HAVE DISCRETION  
12 UNDER 1404 TO STAY AS WELL AS DISMISS, CORRECT?

13 MR. SMITH: I BELIEVE SO, YOUR HONOR.

14 THE COURT: I COULD JUST SAY, WELL, LET'S  
15 JUST STOP THE BLEEDING IN THIS CASE AND GO FIGHT  
16 GERMANY FOR A WHILE, AND THEN IF THINGS ARE -- IF  
17 YOU CAN'T GET A COMPLETE RESOLUTION BETWEEN THE  
18 PARTIES, THEN THIS CASE CAN BE TAKEN OUT OF THE  
19 FREEZER AT A LATER DATE.

20 THAT'S AN OPTION THE COURT HAS, ISN'T IT?

21 MR. SMITH: THAT'S CORRECT. AND ALTHOUGH  
22 THAT'S A SECONDARY OPTION --

23 THE COURT: THAT'S NOT WHAT YOU ASKED FOR  
24 BUT IT'S SOMETHING THE COURT CAN DO.

25 MR. SMITH: RELEVANT TO THAT, YOUR HONOR,

1 BECAUSE THIS HEARING GOT MOVED A COUPLE OF WEEKS  
2 BECAUSE OF DEFENSE COUNSEL'S VACATIONS WHICH IS  
3 FINE, THE COMMENCEMENT OF THE TRIAL DID, IN  
4 GERMANY, STARTED JUNE -- THERE IS A DATE NOW  
5 JUNE 16TH FOR THE RENDITION OF A JUDGMENT.

6 NOW, I DON'T WANT TO SAY THAT MEANS THEY  
7 WILL RENDER A FINAL JUDGMENT, I DON'T WANT TO  
8 MISLEAD THE COURT, BUT IT IS A DATE TO EITHER  
9 DECIDE, ARE WE GOING TO RENDER A FINAL JUDGMENT, A  
10 PARTIAL JUDGMENT, OR ARE WE GOING TO ASK FOR  
11 SOMETHING MORE?

12 SO THERE IS THAT NEXT DATE OUT THERE.  
13 AGAIN, I DON'T -- I THINK THE FORUM ISSUE HERE IS  
14 TEED UP, AND WITH THE FACTORS WEIGHING SO HEAVILY  
15 IN OUR CLIENT'S FAVOR, IT SHOULD BE DISMISSED

16 THE COURT: BUT IF I WERE TO STAY THIS  
17 CASE UNTIL AFTER A JUDGMENT IS RENDERED IN THE  
18 GERMAN COURT, THEN AT THAT POINT WE COULD  
19 RECONVENE, WE COULD CONSIDER WHAT THE PRECLUSIVE  
20 EFFECT, IF ANY, OF THAT JUDGMENT IS AND WHERE IT  
21 LEAVES THE PARTIES, AND THEN THE COURT COULD DECIDE  
22 WHETHER TO GO FORWARD IN THIS CASE OR NOT.

23 THAT'S ANOTHER OPTION THE COURT HAS.

24 MR. SMITH: THAT IS CORRECT.

25 AND JUST ONE EFFORT TO PERSUADE

1 YOUR HONOR OF THE FIRST OPTION, LET ME MAKE THIS  
2 POINT, WHICH IS: I THINK WE SHOULD STEP BACK HERE  
3 FOR A SECOND AND TALK ABOUT WHAT'S ACTUALLY BEING  
4 SOUGHT. BECAUSE IF WE LOOK AT WHAT'S GOING ON  
5 HERE, FACEBOOK IS TRYING TO RECOVER FOR HARM THAT  
6 IS OCCURRING IN GERMANY.

7 IF YOU LOOK AT THEIR SUPPLEMENTAL REPLY  
8 THEY FILED, THEY HAVE THE NUMBER \$100 MILLION IN  
9 DAMAGES. THAT'S A TELLING STATEMENT BECAUSE  
10 THERE'S NO WAY THERE'S \$100 MILLION IN DAMAGES FOR  
11 ACTIVITY THAT OCCURRED IN THE UNITED STATES.  
12 THAT'S THE ENTIRE VALUE OF STUDIVZ. THEY ARE  
13 SEEKING AN INJUNCTION TO SHUT DOWN STUDIVZ  
14 ALTOGETHER.

15 SO THERE'S BEEN NO ARGUMENT THAT WE  
16 SHOULD BE ALLOCATING SOMETHING TO THE UNITED STATES  
17 ONLY HERE. SO WHAT'S GOING TO HAPPEN IN GERMANY --  
18 AND THE GERMAN COURT IS WELL AWARE OF THE PENDENCY  
19 OF THIS CASE BECAUSE IT WAS DISCUSSED ON THE  
20 APRIL 28TH TRIAL. MAYBE WE WAIT TO SEE AND I CAN  
21 BRIEF IT AND GO THROUGH IT, BUT IT'S CLEAR IT'S  
22 GOING TO HAVE A PRECLUSIVE EFFECT.

23 AND IN THE CASE -- ONE OF THE CASES SAID  
24 WHEN YOU HAVE THE INFRINGEMENT OCCURRING FROM  
25 SINGAPORE, THE BEST PLACE TO GO, IF YOU ARE GOING

1 TO SHUT DOWN THE INFRINGING PARTY, IS THE SOURCE.

2 THE COURT: YEAH.

3 MR. SMITH: AND THAT'S EXACTLY WHAT THEY  
4 ARE DOING.

5 THE COURT: ALL RIGHT.

6 LET ME GET A REACTION FROM COUNSEL,  
7 BECAUSE I DON'T WANT TO SPRING A SURPRISE ON  
8 ANYBODY.

9 WHAT WOULD THE EFFECT BE ON FACEBOOK IF  
10 THE COURT SIMPLY SAID, ALL RIGHT, STOP THE  
11 CALIFORNIA ACTION IN ITS TRACKS UNTIL THE GERMAN  
12 COURT RULES AND THEN WE WILL SEE WHAT'S GOING ON?

13 MR. GRAY: WELL, THE DEVIL WOULD BE IN  
14 THE DETAILS THEN, YOUR HONOR.

15 ARE WE SAYING FACEBOOK HAS TO BRING ITS  
16 CALIFORNIA AND U.S. BASED CLAIMS IN THE GERMAN  
17 ACTION? BECAUSE THEN, AGAIN, WE FEEL THAT'S NOT  
18 WARRANTED AND PROPER IN THIS INSTANCE BASED ON THE  
19 STRONG DEFERENCE THAT SHOULD BE PROVIDED TO  
20 FACEBOOK FOR LITIGATING THESE CLAIMS IN THIS  
21 COURTROOM.

22 THE COURT: I'M NOT EVEN SURE THAT'S  
23 POSSIBLE IF THE COURT HAS ALREADY CONDUCTED AN  
24 EVIDENTIARY PROCEEDING.

25 MR. GRAY: OKAY. LET ME CLARIFY THAT.

1                   WITH ALL DUE RESPECT TO COUNSEL, THAT  
2                   JUNE --

3                   THE COURT:   THAT'S ABOUT THE THIRD TIME I  
4                   HEARD THAT PHRASE TODAY, I'M GETTING WORRIED.

5                   MR. GRAY:   WELL, MAYBE -- BECAUSE HE  
6                   VASTLY OVERSTATES WHAT'S GOING ON IN GERMANY.

7                   THERE HAS NOT BEEN A TRIAL.   WHAT OCCURRED ON  
8                   TUESDAY WAS ESSENTIALLY A STATUS CONFERENCE.   THE  
9                   PARTIES CAME IN, THEY DISCUSSED THE CASE, FACEBOOK  
10                  WAS GIVEN AN OPPORTUNITY TO DISCUSS -- TO BRIEF,  
11                  ADDITIONALLY, THE CLAIM THAT HE'S TALKING ABOUT  
12                  WHICH IS A COPYRIGHT INSPECTION CLAIM, IT IS NOT  
13                  THE COMPUTER FRAUD TRESPASS CLAIM.

14                  SO GOING INTO STUDIVZ AND THE DEFENDANT'S  
15                  HEADQUARTERS TO GET ALL THE DOCUMENTS AND ACCESS TO  
16                  THE COMPUTERS, IS AN INSPECTION OF THEIR SOURCE  
17                  CODE CLAIM.   IT IS NOT RELATED TO THE COMPUTER  
18                  FRAUD AND ABUSE ACT --

19                  THE COURT:   LET ME REPHRASE MY QUESTION  
20                  WITH PARTICULARITY.

21                  IS WHAT EMANATES FROM THE GERMAN COURT IN  
22                  JUNE LIKELY TO HAVE SOME TYPE OF PRECLUSIVE EFFECT  
23                  ON THE CLAIMS THAT FACEBOOK HAS BROUGHT IN  
24                  CALIFORNIA?

25                  MR. GRAY:   IT MAY.



1           BUT MY UNDERSTANDING IS WHAT'S GOING TO  
2       HAPPEN IN JUNE IS THE COURT IS GOING TO SET THE  
3       SCHEDULE FOR THE SOURCE CODE INSPECTION CLAIM, THE  
4       SOURCE CODE COPYRIGHT CLAIM, WHICH MAY TAKE SIX TO  
5       NINE MONTHS TO ADJUDICATE, AND THEN THERE WILL BE A  
6       TRIAL ON THE MERITS -- EVIDENTIARY HEARING ON THE  
7       MERITS AFTER THAT.

8           THE COURT:   SO IT WOULD BE CLEANER IF THE  
9       COURT SAID YAY OR NAY WITH THE REGARD TO THE FORUM  
10      NON CONVENIENS.

11          MR. GRAY:   IT'S CLEANER -- I DON'T THINK  
12      THERE'S ANY REASON TO DELAY UNTIL AFTER JUNE  
13      BECAUSE I DON'T THINK JUNE IS GOING TO BE  
14      DISPOSITIVE.

15          THE COURT:   THAT'S MY QUESTION.

16          SO A STAY REALLY WOULDN'T GET YOU  
17      ANYWHERE.   YOU'D RATHER EITHER GET SENT THERE AND  
18      AND/OR NOT GO THERE AT ALL; AND OBVIOUSLY, YOU  
19      PREFER THE LATTER.

20          MR. GRAY:   RIGHT.   I THINK WE DESERVE TO  
21      BE HERE.

22          AND I THINK WHAT COUNSEL HAS SAID  
23      REGARDING THE GERMAN CASE IS LARGELY INDICATIVE OF  
24      WHAT WE'VE GOT HERE.   THERE'S A BIG DISPUTE AGAIN,  
25      A FACTUAL DISPUTE, TO THE SIMILARITY OF THE GERMAN

1 CASE VERSUS THE CASE HERE.

2 AND AS THESE CASES HAVE DISCUSSED, THE  
3 RECORD OF DEFENSE COUNSEL AND PLAINTIFF'S COUNSEL  
4 SAYING WHAT THEIR INTERPRETATION IS OF WHAT'S GOING  
5 ON IN THE ALTERNATIVE FORUM REALLY DOESN'T CARRY  
6 THE DAY FOR THE DEFENDANTS UNDER A FORUM NON  
7 CONVENIENS ANALYSIS.

8 THEY NEED TO COME IN AND SHOW THAT IT IS  
9 DUPLICATIVE, AND ALL WITNESSES AND ALL TESTIMONY  
10 WOULD BE --

11 THE COURT: AND THAT'S THE CALL I NEED TO  
12 MAKE. THAT'S WHAT SINOCHEM SAYS. THAT'S THE  
13 STANDARD. I MEAN, IT'S GOT TO BE, ESSENTIALLY, THE  
14 SAME CASE. AND YOU GOT A COUPLE BELLS AND WHISTLES  
15 ON IT HERE THAT THEY DON'T HAVE THERE, BUT IN ORDER  
16 FOR THE COURT TO TRANSFER AT THIS STAGE IT WOULD  
17 HAVE TO FIND IT WAS ESSENTIALLY THE SAME CASE, IT  
18 WAS ARISING OUT OF THE SAME DISPUTE, AND OF COURSE  
19 THERE'S DIFFERENT CLAIMS FOR RELIEF AND DIFFERENT  
20 LEGAL THEORIES AND LEGAL SYSTEMS.

21 MR. GRAY: BUT BEYOND THAT, IT'S  
22 DEFENDANT'S BURDEN TO COME FORWARD TO OVERCOME THE  
23 SUBSTANTIAL DEFERENCE HERE. AND IF WE LOOK AT THE  
24 ADELSON CASE, THE HAYES BICYCLE CASE, THE ALNWICK  
25 V. EUROPEAN MICRO, 137 F. SUPP.2D 112, IN WHICH IT

1 SPECIFICALLY SAYS THE AFFIDAVITS OF THE ATTORNEYS  
2 IS INSUFFICIENT TO SHOW THE DUPLICATIVE NATURE OF  
3 THE TWO LITIGATIONS, AND THEREFORE IT SHOULDN'T BE  
4 GIVEN ANY WEIGHT WHATSOEVER WITH RESPECT TO FORUM  
5 NON CONVENIENS.

6 EVEN THOUGH IN THESE CASES ADELSON AND  
7 HAYES BICYCLE AND DOLE, PLAINTIFFS THEMSELVES FILED  
8 SUIT IN THE OTHER JURISDICTION.

9 IF I MAY, YOUR HONOR, THE CREATIVE AND  
10 THE LOCKMAN CASE ARE CLEARLY DISTINGUISHABLE. THE  
11 REASON THAT THE ALTERNATIVE FORUMS WERE AT ISSUE IN  
12 THOSE CASES IS BECAUSE ALMOST ALL OF THE OTHER  
13 ACTIONS OCCURRED IN THOSE ALTERNATIVE FORUMS.

14 IN THE CREATIVE LABS CASE, THE PARTIES,  
15 ALTHOUGH THEY WERE SUING UNDER THEIR AMERICAN  
16 SUBSIDIARIES, THE COURT RECOGNIZED THAT THE PRIMARY  
17 PARTIES WERE THE SINGAPORE COMPANIES.

18 THEY WERE FIGHTING OVER THE MANUFACTURE  
19 OF SINGAPORE PRODUCTS MANUFACTURED IN SINGAPORE.  
20 THE PRIMARY PARENT COMPANIES WERE BOTH SINGAPORE  
21 COMPANIES. THE INFRINGEMENT WAS OCCURRING IN  
22 SINGAPORE BUT THEY DECIDED TO COME TO THE U.S. THE  
23 COURT SAID NO IN ADELSON.

24 AND WHAT THE COURT DID SAY ON PAGE TEN OF  
25 THAT OPINION IS, IT'S NOT A CASE OF PIRACY OF

1 AMERICAN MADE PRODUCTS INVOLVING AMERICAN  
2 COMPANIES.

3 THIS IS A CASE OF AMERICAN MADE PRODUCTS  
4 AND PIRACY, ESSENTIALLY, COPYING -- WHOLESALE  
5 COPYING OF THE LOOK AND FEEL --

6 THE COURT: BY A GERMAN COMPANY --

7 MR. GRAY: YES. AND THAT IS  
8 DISTINGUISHABLE. THE COURT IN CREATIVE SAID, NO,  
9 THEY ARE SINGAPORE COMPANIES.

10 THE COURT: RIGHT.

11 MR. GRAY: AND, ADDITIONALLY, IN THE  
12 LOCKMAN CASE THE MAIN ISSUE IN THAT CASE WAS THE  
13 JAPANESE COPYRIGHT ISSUE. IT FLOWED THROUGH EVERY  
14 CLAIM THAT THE PLAINTIFF WAS TRYING TO BRING.

15 THE PLAINTIFF HAD A 30-YEAR RELATIONSHIP WITH  
16 THE ASIAN COMPANY THAT IT THEN TURNED AROUND AND  
17 SUED. ALL OF THE COPYRIGHT ISSUES WERE IN JAPAN  
18 AND ASIA AND THE PRODUCTS SOLD WERE IN JAPAN AND  
19 ASIA.

20 SO WE ARE LOOKING AT ANOTHER SUIT BECAUSE  
21 ALL THE UNDERLYING ACTIONS WERE THERE, AND  
22 ESSENTIALLY THE HARM FOR THOSE JAPANESE COPYRIGHTS  
23 WAS IN JAPAN.

24 THE COURT: OKAY.

25 MR. GRAY: ONE OTHER POINT I'D LIKE TO

1 MENTION, YOUR HONOR, IN TERMS OF THE GERMAN AND  
2 U.S. CASE --

3 THE COURT: YES.

4 MR. GRAY: FACEBOOK SHOWED ITS INDICATION  
5 TO BE HERE IN THIS FORUM. COINCIDENTALLY ENOUGH,  
6 WE BOTH FILED SUIT ON THE SAME DAY.

7 SO THEY FILED IN GERMANY THEIR  
8 DECLARATORY RELIEF ACTION AND WE FILED HERE, SAME  
9 DAY. WE CLEARLY INDICATED OUR INTENT TO BE HERE.

10 AGAIN, COUNSEL IS APPLYING U.S. THOUGHT  
11 AND U.S. PROCEDURES TO THE CLAIMS IN GERMANY. YES  
12 WE ARE PLAINTIFF IN COLOGNE, BUT AS WE POINTED OUT  
13 IN THE KATHARINA SCHEJA DECLARATION, I THINK DOCKET  
14 NUMBER 126, THAT PROCEDURE IS LARGELY A  
15 COUNTERCLAIM TO A DECLARATORY RELIEF ACTION.

16 WE DIDN'T HAVE THE SAME OPPORTUNITIES TO  
17 STAY OR DISMISS THOSE CLAIMS IN GERMANY. IT'S A  
18 DIFFERENT SYSTEM WITH DIFFERENT PROCEDURES.

19 THE FACT WE ARE PLAINTIFF IN COLOGNE IS  
20 JUST COUNTERCLAIMS TO THE DECLARATORY JUDGMENT  
21 ACTION TIMED BY THESE FOLK.

22 THE COURT: WELL, BEST EFFORTS IN A  
23 DECLARATORY JUDGMENT ACTION, ANYWAY.

24 THE POINT IS IT'S LARGELY THE SAME  
25 DISPUTE. AND YOU ARE REALLY ARGUING ABOUT WHERE IT

1            OUGHT TO BE HEARD.

2            MR. GRAY:    WELL, WE DISAGREE WITH THAT,  
3            OBVIOUSLY, AS WE'VE TALKED ABOUT.    WE DON'T THINK  
4            IT'S LARGELY THE SAME DISPUTE.    BUT FOR THEIR  
5            FILING THE DECLARATORY RELIEF ACTION, WE WOULD NOT  
6            BE HERE, FACEBOOK WOULD NOT BE IN GERMANY.

7            THE COURT:    I THINK WE'VE HAD A GOOD  
8            DISCUSSION, AND I WILL GIVE THE MATTER SOME THOUGHT  
9            AND I'LL GET A DECISION OUT SOON.

10           MR. GRAY:    THANK YOU, YOUR HONOR.

11           MR. SMITH:    I DID WANT TO RESPOND TO ONE  
12           POINT.

13           THE COURT:    REALLY?    YOU DON'T THINK  
14           YOU'VE HAD ENOUGH ORAL ARGUMENT?    YOU'VE HAD HALF  
15           AN HOUR.    THAT'S ABOUT TEN TIMES MORE THAN MOST  
16           PARTIES GET.

17           MR. SMITH:    THE LAWSUIT DOESN'T START  
18           JULY 18TH, 2008.    THEY SENT DEMAND LETTERS IN  
19           JANUARY 2007.    WE ACTUALLY FILED IN COURT IN  
20           GERMANY WHICH WAS AN ANTICIPATED DEFENSE.

21           SO THE GERMAN-NESS OF THIS DISPUTE IS  
22           IT'S GENESIS.

23           THE COURT:    OKAY.    WELL, I'M ACTUALLY  
24           GOING TO GO BACK AND LOOK AT THE FILINGS AND I WILL  
25           MAKE MY OWN JUDGMENT OF THAT.

1                   THANK YOU.

2                   MR. SMITH:   THANK YOU, YOUR HONOR.

3                   MR. GRAY:   I'M SORRY, YOUR HONOR THIS IS  
4                   REALLY -- ARE WE ON FOR THE CMC CALENDAR --

5                   THE COURT:   I'M NOT GOING TO DO THE CMC  
6                   UNTIL I DECIDE THE CASE.   I WILL GIVE YOU NOTICE.

7                   THANK YOU.

8                   (WHEREUPON, THE PROCEEDINGS IN THIS  
9                   MATTER WERE CONCLUDED.)

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4 **CERTIFICATE OF REPORTER**  
5  
6  
7

8 I, THE UNDERSIGNED OFFICIAL COURT  
9 REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
10 THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
11 FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
12 CERTIFY:

13 THAT THE FOREGOING TRANSCRIPT,  
14 CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
15 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
16 SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
17 HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
18 TRANSCRIPTION TO THE BEST OF MY ABILITY.  
19  
20  
21

22 \_\_\_\_\_  
23 SUMMER A. CLANTON, CSR  
24 CERTIFICATE NUMBER 13185  
25